Yian Sdn Bhd v Datuk Bandar Kuala Lumpur & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–84 OF 1993
ABDUL KADIR SULAIMAN J
3 SEPTEMBER 1997

Civil Procedure *— Affidavits — Affidavit filed during course of submission— Whether filing of affidavit was an attempt to introduce new evidence when all necessary evidence were already before the court — Whether abuse of process of court — Whether tantamount to the reopening of the case*

Evidence *— Fresh or further evidence — Affidavit filed during course of submission — Failure to obtain leave of court — Whether filing of affidavit was an attempt to introduce new evidence when all necessary evidence were already before the court — Whether abuse of process of court — Whether tantamount to the reopening of the case*

The applicant sought to quash the decision of the first respondent, the Datuk Bandar of Kuala Lumpur. The development director of the first respondent replied to the allegations of the applicant by way of affidavit on behalf of the first respondent. The first respondent, whose decision was being challenged by the applicant, did not, up to that stage, affirm any affidavit in opposition. The applicant in one of its affidavits even drew attention to the absence of any affidavit by the first respondent. Nearing completion of the applicant's submission in reply, the first respondent filed an affidavit ('the affidavit') inter alia repeating and adopting in entirety all the affidavits of the development director of the first respondent. The applicant applied to have the affidavit expunged from the court's record on the ground that it was too late in the day for the first respondent to adduce any further evidence, and therefore, the affidavit was filed contrary to procedure and was an abuse of the process of court.

Held, allowing the application:

The filing of the affidavit by the first respondent was an attempt to introduce new evidence when all necessary evidence were already before the court. In this case, not only had the main submission by the applicant in respect of the substantive motion been completed but also that of the first and second respondents when the court adjourned the matter to continue with the hearing of the final reply by the applicant. To allow fresh evidence would be tantamount to the reopening of the case and thus an abuse of process of court. Moreover, being fresh evidence proffered, the first respondent by filing it on 15 April 1997 did so without the leave of the court. The affidavit was, therefore, expunged from the record in this proceedings (see pp 557F–G, I and 558A–B); *Cheah Theam Swee & Anor v Overseas Union Bank Ltd* [1981] 1 MLJ 426 followed.

A **[Bahasa Malaysia summary**

Pemohon memohon supaya keputusan penentang pertama, iaitu Datuk Bandar Kuala Lumpur dibatalkan. Pengarah pembangunan pennetang pertama membalas kepada pengataan pemohon dengan afidavit bagi pihak penentang pertama. Penentang pertama, yang
B keputusannya dicabar oleh pemohon tidak, sehingga peringkat itu, mengikrar apa-apa afidavit membantah. Pemohon dalam salah satu afidavitnya juga telah menarik perhatian kepada ketiadaan sebarang afidavit oleh penentang pertama. Apabila hujah jawapan pemohon hampir selesai, penentang pertama memfailkan satu afidavit ('afidavit tersebut') antara lain mengulang dan menerimapakai secara
C keseluruhan segala afidavit pengarah pembangunan penentang pertama. Pemohon memohon supaya afidavit dipadamkan daripada rekod mahkamah atas alasan bahawa adalah terlalu lewat sekarang untuk penentang pertama mengemukakan apa-apa keterangan lanjut, dan dengan itu, afidavit difailkan bertentangan dengan prosedur dan
D adalah satu penyalahgunaan proses mahkamah.

Diputuskan, membenarkan permohonan:

Pemfailan afidavit oleh penentang pertama merupakan satu percubaan untuk memperkenalkan keterangan baru walhal segala keterangan
E yang perlu sudah pun berada di hadapan mahkamah. Dalam kes ini, bukan sahaja hujah utama pemohon berhubung dengan usul substantif telah selesai tetapi juga hujah penentang pertama dan kedua apabila mahkamah menangguh perkara itu untuk meneruskan pembicaraan jawapan muktamad oleh pemohon. Untuk membenarkan keterangan baru seumpama membuka semula kes dan justeru itu suatu
F penyalahgunaan proses mahkamah. Tambahan pula, sebagai keterangan yang baru, dengan memfailkannya pada 15 April 1997 penentang pertama telah berbuat demikian tanpa kebenaran dari mahkamah. Maka afidavit dipadamkan daripada rekod dalam prosiding ini (lihat ms 557F–G, I dan 558A–B); *Cheah Theam Swee & Anor v Overseas Union Bank Ltd* [1981] 1 MLJ 426 diikut.]
G

Notes

For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

For cases on fresh and further evidence, see 7 *Mallal's Digest* (4th Ed,
H 1995 Reissue) paras 975–1003.

Cases referred to

Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors [1989] 1 MLJ 426 (folld)

I *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 (refd)

Legislation referred to

Federal Territory (Planning) Act 1982 s 22
Rules of the High Court 1980 O 53 r 1(2)

Lim Phaik Gan and *Alex Chang Huey Wah* (*Alex Chang & Co*) for the applicant.

S Nanthabalan and *Trevor George De Silva* (*Shook Lin & Bok*) for the first respondent.

CT Annuthurai (*Hamzah Abu Samah & Partners*) for the second respondent.

Abdul Kadir Sulaiman J: Pursuant to leave granted on 7 October 1993, the applicant on 18 October 1993 filed a notice of motion for the following orders:

(1) an order of certiorari to remove into this court and to quash the decision of the first respondent, Datuk Bandar Kuala Lumpur dated 20 May 1993 whereby the first respondent approved an application by the second respondent for planning permission to build a four-star hotel comprising 250 rooms between the 6th and 15th floors, recreational facilities on the 5th floor and car parks between the 2nd and 4th floors on Lots 928, 929 and 931 Section 53 Jalan Ceylon, Kuala Lumpur;

(2) an order of mandamus or alternatively an order under the Specific Relief Act 1950 directing the first respondent to exercise his discretion according to the law pursuant to s 22 of the Federal Territory (Development) Act 1982 and rr 5 and 6 of the Planning (Development) Rules 1970 and r 2 of the Federal Territory (Planning) (Zoning and Density) Rules 1985 and/or to obey the Kuala Lumpur Comprehensive Development Plan;

(3) an order of mandamus or alternatively an order under the Specific Relief Act 1950 directing the first respondent to cancel/retract the decision of the first respondent whereby the first respondent approved an application by the second respondent for planning permission to build a four-star hotel comprising 250 rooms between the 6th and 15th floors, recreational facilities on the 5th floor and car parks between the 2nd and 4th floors on Lots 928, 929 and 931 Section 53 Kuala Lumpur;

(4) that all necessary and consequential directions be given; and

(5) that the costs of this application and consequential costs be costs in the cause or at the court's direction.

The application of the applicant is supported by an affidavit of Lim Phaik Gan, the managing director of the applicant's company affirmed on 23 July 1993 exhibiting various exhibits. The grounds upon which the relief is sought are contained in a statement made pursuant to O 53 r 1(2) of the Rules of the High Court 1980 ('the RHC') which are that the first respondent when considering and approving the application of the second respondent:

(a) has acted without any or sufficient or reasonable grounds and/or by taking irrelevant considerations into account and/or failing to take relevant considerations into account;

(b) has misconstrued the scope and effect of his statutory direction under the whole of the Federal Territory (Planning) Act 1982 from the decision-making process in respect of the decision of the first respondent dated 20 May 1993 (in particular s 22 thereof) as well as rr 5 and 6 of the Planning Development Rules 1970 as well as r 2 of the Wilayah Persekutuan (Planning) (Zoning and Density) Rules 1985 and finally the Comprehensive Development Plan of Kuala Lumpur;

(c) has acted contrary to natural justice and/or procedure by depriving the adjoining owners of the opportunity of replying to the submission of the second respondent in support of its application;

(d) has unlawfully and without authority approved the said application for the revised proposed development and/or approved the revised development proposal without taking into account any of the matters raised by the applicant in its grounds of objection or alternatively by assigning little or no weight to those matters;

(e) has failed or neglected or omitted to take into account that the infrastructure facilities of Bukit Ceylon were designed and installed for a lower population density and for small scale, low rise development;

(f) has failed to provide for a master plan or a local plan before proceeding to consider and approve the revised development proposal;

(g) has acted in excess of or without jurisdiction or misapplied his statutory discretion under s 22 of the Federal Territory (Planning) Act 1982; and

(h) generally acted in breach of the principles of natural justice in the conduct of the hearing under r 5 of the Planning (Development) Rules 1970 on 26 April 1993 at which the applicant was present but not together with the second respondent.

On 3 June 1994, the second respondent filed an affidavit affirmed on 3 May 1994 by Theng Gee Long, its project engineer in reply to the affidavit in support of the applicant. This affidavit of the second respondent raises the issue that the statement filed by the applicant pursuant to O 53 r 1(2) of the RHC was irregular as it does not contain any particulars in respect of the complaints of breach of natural justice or ultra vires against the first respondent and called for the rejection of the said statement as being devoid of any specific ground upon which the court could rely to consider the application on its merits. Consequent upon the said deposition, the applicant on 10 June 1994 by another notice of motion applied for leave to amend the said statement accordingly. On 16 June 1994, by consent, an order was made in the terms of the prayer in the said notice of motion of the applicant.

Meanwhile, on 8 June 1994 the first respondent filed on affidavit affirmed by Haji Mokhtar bin Long Idris on the same day enclosing various exhibits. The deponent is the development director of the Jabatan Perancang dan Kawalan Bangunan of the Dewan Bandaraya Kuala Lumpur who deposed that he was duly authorized to affirm the affidavit on behalf of the Datuk Bandar Kuala Lumpur, the first respondent. On 17 August 1994, the first respondent filed another affidavit also affirmed by Haji Mokhtar bin Long Idris on the same day again deposing that he was duly authorized to affirm the said affidavit on behalf of the first respondent. Then on 15 September 1994, the first respondent filed yet another affidavit

affirmed by the same Haji Mokhtar bin Long Idris on 12 September 1994, also on the authority and on behalf of the first respondent. The first respondent himself, whose decision is being challenged by the applicant, so far has not affirmed any affidavit in opposition to the application of the applicant.

On 29 September 1994, the applicant filed its second affidavit affirmed by Lim Phaik Gan, the managing director on 28 September 1994 referring to the various affidavits filed for and on behalf of both the respondents including those three affidavits affirmed by Haji Mokhtar bin Long Idris for the first respondent. At para 16 of this affidavit of the applicant, it is deposed that the decision that the applicant is seeking to impugn is a decision of the Datuk Bandar himself made on 20 May 1993. The whole of the evidence in answer to the applicant's case is put forth by Haji Mokhtar bin Long Idris, the Ketua Pengarah, Jabatan Perancangan dan Kawalan Bangunan. He vouches for what the Datuk Bandar supposedly did or did not take into account This evidence is hearsay. Paragraphs 17 and 18 of the affidavit by Lim Phaik Gan go on to state as follows:

> (17) It is said by Haji Mokhtar bin Long Idris, the Ketua Pengarah, Jabatan Perancangan dan Kawalan Bangunan that he prepared a report for the Datuk Bandar on the hearing under r 5(4) of the Planning Development Rules 1970 which was held on 26 April 1993. The applicant has challenged the adequacy of the report, and yet the report has to date not been placed in evidence.
>
> (18) For all these reasons it should be clear that contrary to what is maintained in para 3(2) of the affidavit dated 12 September 1994, the Datuk Bandar has not taken into account all relevant planning considerations before giving planning approval to the second respondent. Alternatively, for the reasons set out in paras 16 and 17 herein, an inference ought to be drawn to this effect.

Therefore as early as 29 September 1994, the first respondent had been forewarned of the absence of his personal affidavit to defend his decision made and that the evidence as contained in the affidavit of Haji Mokhtar was hearsay. Instead of taking the cue from the content of the affidavit of Lim Phaik Gan aforesaid, the first respondent filed on 25 March 1996 another affidavit of Haji Mokhtar bin Long Idris affirmed on the same day, again on the authority and on behalf of the first respondent. Paragraphs 5–8 of this affidavit are an attempt to justify the non-filing of the affidavit by the first respondent himself. They are:

> (5) Terlebih dahulu saya ingin menegaskan bahawa perkara-perkara yang dibentangkan di dalam afidavit kedua PG Lim tersebut adalah merupakan percubaan oleh pemohon untuk mengkritikkan tindakan Datuk Bandar Kuala Lumpur dalam cara dan bentuk tugas-tugasnya dikendalikan di bawah s 22 Akta (Perancangan) Wilayah Persekutuan 1982 walaupun deponen tidak mempunyai apa-apa kelayakan atau kemahiran atau kemahiran dalam bidang perancangan untuk menyoal atau mencabar perkara-perkara teknikal berhubung dengan keputusan Datuk Bandar Kuala Lumpur untuk meluluskan perintah pembangunan.

(6) Justeru itu saya ingin mengggesa mahkamah untuk mengabaikan dan menolak kenyataan-kenyataan kritik yang diutarakan di dalam afidavit kedua PG Lim tersebut. Sebaliknya jika perkara-perkara ini diambil kira, maka saya ingin menegaskan bahawa jawapan terhadap perkara-perkara ini telah pun diutarakan di dalam afidavit-afidavit saya yang terdahulu di mana saya telah menerangkan dengan jelas dan secara mendalam perkara-perkara yang telah diambil kira sebelum perintah pembangunan diluluskan dan juga aspek-aspek lain mengenai bagaimana tugas Datuk Bandar dikendalikan.

(7) Berhubung dengan perenggan 16 afidavit kedua PG Lim tersebut, saya ingin menegaskan bahawa saya, selaku Pengarah di Jabatan Perancang dan Kawalan Bangunan, adalah diberi kuasa di bawah Akta (Perancangan) Wilayah Persekutuan 1982 melalui Pemberitahuan Warta No 103561/82 untuk mengendalikan kesemua tugas-tugas yang merangkumi s 22 Akta tersebut dan secara tersiratnya termasuk memberi jawapan melalui afidavit bagi pihak Datuk Bandar Kuala Lumpur.

(8) Berhubung dengan tegasan pemohon di perenggan 16 afidavit kedua PG Lim bahawa rekod prosiding perbicaraan bantahan tersebut dan laporan penilaian teknikal harus dikemukakan sebagai ekshibit, saya ingin mengatakan bahawa ianya disusun oleh Jabatan Perancang dan Kawalan Bangunan dan ditandakan sebagai 'SULIT' dan merupakan dokumen-dokumen sulit yang tidak boleh didedahkan kepada pembantah-pembantah atau mana-mana orang lain yang tidak diberi kuasa.

So, the first respondent knew the reason why his personal affidavit was not necessary to defend his own decision which is now being challenged by the applicant.

After several adjournments since the time of its first mention in court on 5 January 1995, this substantive motion of the applicant came before me for disposal on 16 July 1996. I proceeded first to hear the submissions made by learned counsel for the applicant. Unable to complete, the matter was adjourned to 22 August 1996 for learned counsel to continue with his submission. The main submission of the applicant was completed and the matter was adjourned to 4 September 1996 for the respondents to commence with their submissions. On the adjourned date, it went on for two days successively and was again adjourned to 11 September 1996. On 11 September 1996, the respective counsel for the first and second respondents completed their submissions in reply. At the end, learned counsel for the applicant requested for an adjournment to enable him to prepare his final reply. The matter was adjourned to 21 November 1996. At the commencement of the proceeding that day, there was a request for an adjournment from the applicant's side as there was a change of counsel for the applicant. So the matter was adjourned to 27 May 1997 for learned counsel for the applicant to render his final reply.

Meanwhile, on 21 February 1997 the applicant filed another notice to produce the various documents mentioned in the three affidavits of Haji Mokhtar bin Long Idris for the inspection of the applicants after the first of such notice was filed on 12 July 1996 and received no response from the

first respondent. The necessary documents were mentioned in the notices. On 15 April 1997, the Registry received a letter of the same date from learned counsel for the first respondent enclosing a further affidavit filed on the same day affirmed on 14 April 1997 by Dato' Paduka Dr Mazlan bin Ahmad. The deponent was the Datuk Bandar Kuala Lumpur from 15 November 1992 until 13 December 1995. He referred to the various affidavits filed by all parties in the proceedings and to the two notices to produce. He objected to the issue by the applicant of the second notice to produce of 21 February 1997, a duplicate of the first as being an abuse of the process of court and therefore it should be rejected. On the question of the filing of the various affidavits by Haji Mokhtar bin Long Idris on his behalf, it was the contention of the first respondent that they were done pursuant to the delegation of power vide Gazette Notification No 10361/1987 and the filing of the said affidavits was done with authority. Paragraphs 9–12 of his affidavit state as follows:

(9) I wish to state that at the material time, it was thought not necessary that affidavits should be filed personally by the Datuk Bandar Kuala Lumpur and this was based upon the decision of the High Court in another planning case, that is, Kuala Lumpur High Court Originating Motion No R1–25–118–92 (*Zain Azahari bin Zainal Abidin v Datuk Bandar Kuala Lumpur*) which rules that affidavits need not be filed personally by the Datuk Bandar Kuala Lumpur.

(10) However, on appeal, that ruling has since been reversed and the Court of Appeal vide Civil Appeal No W–04–35–94 (*Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17) in a judgment dated 17 February 1997 decided that affidavits have to be filed personally by the Datuk Bandar Kuala Lumpur. I am now shown a copy of the grounds of judgment of the Court of Appeal which is annexed hereto and marked as exh 'A'.

(11) Accordingly, I am advised in law that in view of the ruling of the Court of Appeal No W–04–34–94, it is now necessary for me to affirm this affidavit in my capacity as the former Datuk Bandar Kuala Lumpur who had granted planning permission to the second respondent.

(12) Accordingly, I will state and confirm that all the facts and matters stated in the said affidavits of En Haji Mokhtar bin Long Idris are true and correct.

The said affidavit goes on to state that the deponent repeats and adopts in entirety all the said affidavits of En Mokhtar for the purposes of supporting and justifying his decision to grant planning permission to the second respondent in relation to the subject land as he had properly and reasonably exercised his discretion under s 22 of the Federal Territory (Planning) Act 1982 and had granted planning permission to the second respondent based on the merits of the application submitted by the second respondent and after having taken into account all relevant planning considerations, including the oral as well as written objections of the applicant.

On 20 May 1997, the applicant filed a summons in chambers for the said affidavit of Dato' Paduka Dr Mazlan bin Ahmad to be expunged from the court's record on the ground that the first respondent had completed

its case on 11 September 1996 when its counsel had completed their submissions and therefore, it was now late in the day for the first respondent to adduce any further evidence. It is also the ground that this affidavit was filed not in accordance with procedure and therefore, it was an abuse of the process of court. This summons of the applicant is supported by an affidavit of Caryn Lim, the director of the appellant affirmed on 28 May 1997. It is deposed that Dato' Paduka Dr Mazlan bin Ahmad had ample opportunity to file an affidavit — especially since the fact of the absence of personal affidavit by Datuk Bandar was specifically raised as early as 28 September in the affidavit of Lim Phaik Gan for the applicant — but failed or refused and/or neglected to do so until April 1997. The same issue was raised in the submission of the then counsel for the applicant. Now that counsel for the two respondents had completed their submissions, the admission of this affidavit by Dato' Paduka Dr Mazlan bin Ahmad would amount to a reopening of the case and delay the fair trial of the action and an abuse of the process of court. In reply, the first respondent filed an affidavit of Mimi Aryani bte Mustapha, a legal officer of Dewan Bandaraya Kuala Lumpur, affirmed on 10 June 1997 explaining the delay in the filing of the affidavit of the then Datuk Bandar and that the proceedings had not concluded as the final submission of counsel for the applicant was forthcoming. The second respondent also filed an affidavit by Theng Gee Long to adopt and confirm Mimi Aryani's aforesaid affidavit.

I heard this summons of the applicant on 30 April 1997. At the end of it, I allowed the application of the applicant by the said summons in chambers with costs to be borne by the first respondent. The said affidavit of Dato' Paduka Dr Mazlan bin Ahmad was accordingly expunged from the record in this proceedings. I did so because firstly, the filing of this affidavit of Dato' Paduka Dr Mazlan bin Ahmad by the first respondent was an attempt to introduce new evidence when all necessary evidence were before the court before the parties began their submission. In this case, not only had the main submission by the applicant in respect of the substantive motion been completed but also that of the first and second respondents when the court adjourned the matter to continue with the hearing of the final reply by the applicant. But for the mistake of law, the first respondent knew when all their part of the evidence was before the court, that of the Datuk Bandar, the decision-maker whose decision is being challenged by the applicant, was not proffered. The applicant in one of its affidavits even drew the attention of the first respondent to the absence of the affidavit by the decision-maker. The first respondent took no heed of this but took their chance relying on another case in the High Court — which is *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* — where they were also the respondent where no issue was made of the absence of the personal affidavit of the decision-maker. Now that the position of the law has been made clear by the Court of Appeal — now reported in [1997] 2 MLJ 17 — the first respondent realized that there was something lacking in their evidence opposing the application of the applicant in the substantive motion. Secondly, being fresh evidence proffered, the first respondent by filing it on 15 April 1997 did so without the leave of the

court. I agreed with the submission of Dato' PG Lim of counsel for the applicant that to allow the introduction of this fresh evidence would be tantamount to a reopening of case after the first respondent had completed their submission upon the evidence then before the court. In *Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426, Shankar J had this to say at p 437:

> Halfway through his submission Mr Palasuntharam sought to file yet another affidavit on facts which as he himself admitted due diligence would have discovered. Mr Too strenuously objected. He had already completed his submission and to allow this would be to permit the whole case to be reopened again. I disallowed the application quite simply because to do so would have been to permit an abuse of process. In the absence of specific rules on the matter, I am of the view that in the interests of the effective administration of justice, the rules as to the filing and service of pleadings should apply mutatis mutandis to affidavits. At the very least, the parties should thus have adequate notice of each others' cases before the hearing and avoid a trial by ambush.

In *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin*, the court examined the provisions of s 22 of the Federal Territory (Planning) Act 1982 which gives the discretion to the Datuk Bandar to make a decision. At pp 32–33, Gopal Sri Ram JCA said:

> Third and lastly, a public decision-maker whose exercise of discretion is questioned must meet the challenge by adducing relevant and admissible evidence. Applications for certiorari and the other relief specified in para 1 of the Schedule to the Courts of Judicature Act 1964 are normally contested on affidavit evidence. As a general rule where an applicant files an affidavit alleging that a particular decision was not arrived at in accordance with law, eg because the decision-maker had taken into account irrelevant matters, it is incumbent upon the particular decision-maker in the usual way to affirm and file an affidavit rebutting the allegation and setting out those matters which led him to make the impugned decision.
>
> ...
>
> But, where no cogent reasons are proffered by way of admissible evidence for the absence of such an affidavit, the general rule will apply with full force. Consequently, where allegations on affidavit are unrebutted by the party against whom they are made, a court is entitled to conclude that those allegations have been accepted. See *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, per Edgar Joseph Jr FCJ at p 229.
>
> There is another aspect to this principle. It is that the affidavit, in order to amount to a satisfactory rebuttal, must be affirmed by the person who has personal knowledge of the facts in issue. In cases where the exercise of discretion by a public decision-maker is challenged, in the absence of those special circumstances which we referred to a moment ago, the rebuttal must come from the decision-maker himself. An affidavit by a deponent who has no personal knowledge of the considerations upon which the decision was based is pure hearsay and is worthless as evidence and no court can be expected to pay the slightest attention to it.

A It is in reliance of the above-quoted passage that prompted the first respondent now to file this affidavit of Dato' Paduka Dr Mazlan bin Ahmad having taken no heed of the warning indicated in the affidavit of the applicant. All I can say is that it is too late to close the stable door when the horse has bolted.

B *Application allowed.*

Reported by Eugene Lee Hong Whye

C

D

E

F

G

H

I